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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 827

ARKANSAS PUBLIC SERVICE COMMMISSION AND FIRST ELECTRIC COOPERATIVE CORPORATION ..... *Petitioners*

v.

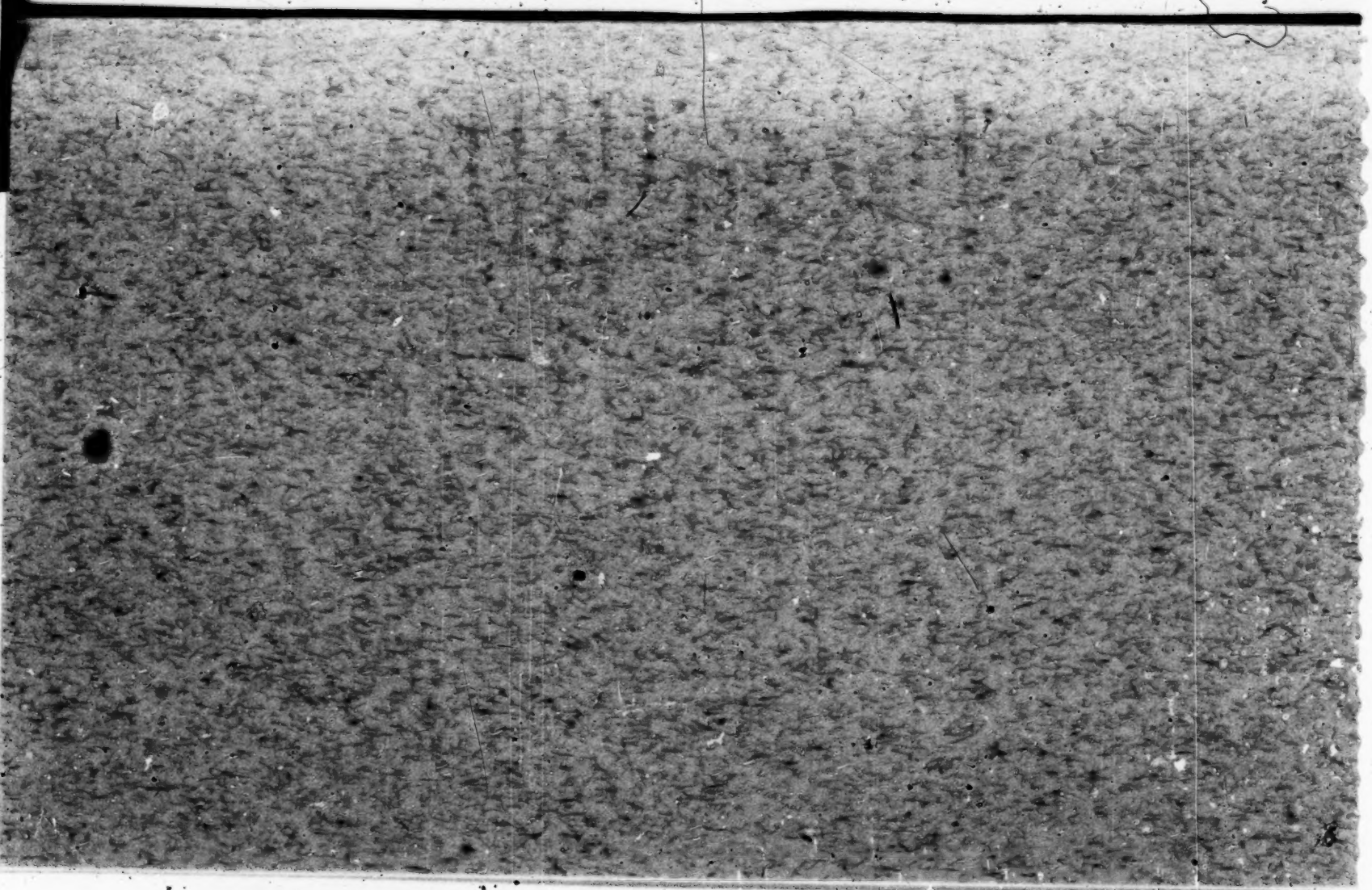
ARKANSAS POWER & LIGHT COMPANY ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIS H. HOLMES *and*
E. B. DILLON, JR.
1014 Boyle Building
Little Rock, Arkansas
Attorneys for Respondent

PARAGON PRINTING CO., LITTLE ROCK



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JURISDICTION

Questions regarding alleged Constitutional rights under the Fourteenth Amendment were raised by Petitioner for the first time on rehearing before the State Supreme Court. Petitioner's statement that Federal questions were also raised in arguments before the Commission and lower courts is not sufficient for presentation of a Federal question. *Live Oak Ass'n.* v. *Railroad Comm.*, 269 U.S. 354, 357-8; *Lynch* v. *New York ex rel*

Pierson, 293 U.S. 52, 54. Attempted presentation of Federal questions in the Petition for Rehearing is not timely. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; *American Security Co.* v. *Baldwin*, 287 U.S. 156. Any right, title, privilege or immunity of Petitioner under the Constitution could have been raised long before the rehearing, but this was not done. Petitioner was bound to anticipate the probability of the Arkansas Supreme Court's ruling in light of prior decisions of the United States Supreme Court and the Arkansas Court on the issues in question. See *Leslie Miller* v. *State*, 227 Ark. 313; *Leslie Miller* v. *Arkansas*, 352 U. S. 187. The Arkansas Court adopted the position which Respondent had advanced in its Response to the Complaint before the Commission and at each stage of its subsequent appeals. Petitioner cannot now show or claim any surprise. *Herndon* v. *Georgia*, 295 U.S. 441.

QUESTIONS PRESENTED

1. Whether the doctrine of intergovernmental immunity forbids the application and enforcement of Arkansas utility service area allocation laws and regulations to electric contractor-suppliers, because it results in substantial interference with the Federal functions of selecting contractors and planning construction and operation of Federal facilities.

2. Whether the application and enforcement of Arkansas utility service area allocation laws and regulations against an electric contractor-supplier is invalid because in conflict with the Federal Armed Forces Procurement Law and regulations thereunder, prescribing the criteria and responsibility for selecting Federal contractors.

3. Does delivery of electric energy by a Power Company under contract with the United States, at a point where the Company has an exclusive franchise and a certificate of convenience and necessity from State authority, violate any constitutional rights of an electric co-operative, where the United States transmits a portion of the electric energy over a transmission and distribution system owner and operated by the United States and uses the energy in an area served by the co-operative under State law.

4. Was Act 103 of the Acts of Arkansas of 1957 lawfully enacted under provisions of the Arkansas Constitution; and if lawfully enacted, would Act 103 and the order of the Public Service Commission deprive the Power Company of constitutional rights guaranteed by the due process and equal protection clauses of Amendment XIV, and by Article I, Section 10 of the United States Constitution.

Constitutional Provisions Involved

1. United States Constitution—Amendment XIV
   Due Process Clause
   Equal Protection Clause
2. United States Constitution—Article VI
   Supremacy Clause
3. United States Constitution—Article I, Section 10

United States Statutes Involved

1. Title 41 United States Code

   Section 151 (c) (1)

   Section 153 (a)

   Section 156 (a)

Arkansas Statutes Involved

1. Act 103, of Arkansas Acts of 1957, Section 3 (Ark. Stats. §73-240)

STATEMENT

This case began with a complaint of the First Electric Cooperative Corporation (hereafter called "Co-operative") which asked the Arkansas Public Service Commission (hereafter called "Commission") to issue an order requiring the Arkansas Power & Light Company (hereafter called "Power Company") to cease and desist furnishing electric service to the United States, which the United States may subsequently use in an air force housing project located on the Little Rock Air Force Base in certain territory which the Co-operative claims the right to serve.

The Air Base covers thousands of acres in Pulaski County, Arkansas. Some of the Base, and all of the housing project, is within the city limits of the City of Jacksonville, which municipality the Power Company serves under an exclusive franchise. Roughly one-half of the Air Base, outside the Jacksonville city limits, was in territory served by the Power Company under a certificate of convenience and necessity, and the other half was in territory served by the Co-operative under a similar certificate.

When the title to the Air Base was acquired by the United States, the Power Company and the Co-operative were notified that they must cease serving the area and remove all of their facilities therein. This was done, and each was paid for the facilities removed. Both utilities executed quitclaim deeds and releases to the United States and ceased serving any customers within the Air Base area.

Subsequently, appropriate Government agencies approached the Power Company and requested it to negotiate a contract for electric service to the Base. These negotiations were carried on under the provisions of the Armed Forces Procurement Act and regulations, and resulted in the contract dated February 19, 1954. This contract, which recites that it was negotiated under the provisions of Title 41 U.S.C., Sec. 151 (c)(1) and Presidential Proclamation 2914, provided for the purchase by the United States of electric energy under certain strict conditions and requirements, but the Power Company was not allowed to locate any facilities within the boundaries of the Base.

On August 30, 1957, the basic contract was amended from an indefinite term terminable on notice to a five year term and by applying different and less costly rate schedules, which became available by reason of the commitment to a five-year term. On October 4, 1957, the contract was again amended by providing for a restricted demand billing, which again reduced the cost of service. Except for these reductions in cost and extension of the term to five years, no changes were made in the basic contract of February 19, 1954.

Under the contract, as amended, the United States takes delivery of all power at the Company's substation located outside the Base, at a point within the city limits

of Jacksonville and within the service area allocated to the Power Company by the Arkansas Commission. All of the distribution and transmission facilities on the Air Base were constructed by, and are wholly owned and maintained by, the United States. Once the power is delivered to the United States at the Power Company's substation, the Company no longer has any control over it, and its use thereafter is subject wholly to the will of the United States. Since a portion of the physical plant of the Air Base (principally base personnel housing) is located in territory in which the Co-operative once held a certificate of convenience and necessity, some of the power purchased by the United States is distributed over Government owned facilities by the United States within such territory. It is this use of which the Co-operative complained.

During the hearing the Co-operative's proof made it clear that it intended to build whatever facilities were necessary to accept delivery of power from the Power Company and then sell the power to the Government. The Co-operative took the position that the United States had to buy all power consumed in the disputed territory from the Co-operative. (See Complaint, Appendix p. 17,18.)

In its order the Commission declared that Section 3 of Act 103 of 1957 (Appendix p. 22) and the Commission's earlier certificate of convenience and necessity were binding upon the Commission and all of the parties to this proceeding. Although it did not expressly say so, the Commission also necessarily held that Act 103 and Commission orders allocating territory were also binding upon the United States.

The Power Company appealed to the Pulaski County Circuit Court, denying the Company was violating any laws of the State or orders of the Commission, alleging

that Act 103 and the Commission's order were unlawful and resulted in a confiscation of the Company's property without due process of law as guaranteed by Amendment XIV of the United States Constitution; that Act 103 and the Commission's order violated Article 1, Section 10 of the United States Constitution by unlawfully impairing its contracts, and that the Commission's attempt to regulate and control the sale and usage of electric power to the United States at the Air Base was void and in conflict with the Armed Forces Procurement Laws and Regulations, and the immunity of the United States from State regulation. The Circuit Court affirmed the Commission's order and the Power Company appealed on the same grounds to the Arkansas Supreme Court.

A majority of the Supreme Court held that the Order of the Commission was necessarily based on an assertion of the right to regulate and control the identity of the electric supplier to the United States in any given area, and that all State laws and regulations attempting to do so were invalid because in conflict with Federal law. The Court also recognized that, if affirmed, the Commission's alleged "simplification" of its order would also result in confiscation of property of the Power Company and an unjust enrichment for the Co-operative.

ARGUMENT

REASONS WHY WRIT SHOULD NOT BE GRANTED

(1) No substantial Federal question is presented.

Petitioner has not presented any substantial Federal questions nor any legitimate reasons why this Court should exercise its discretionary jurisdiction. None of the considerations set forth in Rule 19 of this Court are alleged to exist by Petitioner and none do exist. There are no conflicts in the decisions of lower courts on the questions involved here, and the legal principles are well settled by recent decisions of this Court. *Leslie Miller* v. *Arkansas*, 352 U.S. 187; *Public Utilities Commission* v. *United States*, 355 U.S. 534. Except for these settled principles of law, which were recognized and correctly applied by the State Supreme Court, this case involves no questions of sufficient importance to justify review by this Court.

Petitioner's objections to the State Supreme Court decision, while couched in terms of the due process and equal protection clauses of the Fourteenth Amendment, are actually based upon a fancied judicial impairment of alleged contract rights and approval of alleged contract breaches. Petitioner did not expressly rely on the contract impairment clause of the Constitution (Article I, Section 10), but in any event, this clause may only be invoked where impairment is by legislative action. *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444. Under no circumstances can a breach of contract by the Power Company be turned into a Federal due process question, as Petitioner apparently contends. Nor was there any lack of hearing or right to be heard of which Petitioner can complain. The mere fact that the State Court held that

Petitioner cannot force the Power Company to cease serving the Government does not amount to a taking of property without due process. *Central Land Co.* v. *Laidley*, 159 U.S. 103; *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444.

(2) The decision below is clearly correct.

Constitutional immunity from State regulation of the property, functions and instrumentalities of the United States is firmly established (U.S. Const. Article VI; *Arizona* v. *California*, 283 U.S. 423). This immunity has frequently been extended to dealings of the Government with independent contractors where State regulations interfere in any substantial way with the performance by the Contractor of a Federal function. *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 104; *Smith* v. *Davis*, 323 U.S. 111, 115; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 154; *Leslie Miller* v. *Arkansas*, 352 U.S. 187. The State Court properly recognized this immunity here.

The Co-operative contends that since the United States had not filed a notice of acceptance of jurisdiction under 40 U.S.C. 255 that it had no jurisdiction or immunity here. This same argument was rejected by this Court in connection with the Little Rock Air Force Base in *Leslie Miller* v. *Arkansas*, 352 U.S. 187. Miller was fined in a State court for bidding on an Air Base construction job without having complied with the Arkansas law requiring a contractor's license. The State Court upheld the validity of the regulatory law because the United States had not accepted jurisdiction over the Air Base under 40 U.S.C. 255. (*Leslie Miller* v. *State*, 225 Ark. 285, 281 S.W. 2d 946.) This Court reversed the Arkansas Court and held that the Arkansas regulatory law was

unenforceable against Miller.* The opinion expressly noted the lack of notice required by 40 U.S.C. 255 and obviously considered this factor to be immaterial. (See 352 U.S. at 187.)

The application of the rationale of *Leslie Miller* v. *Arkansas*, 352 U.S. 187, to this case is inescapable. The same procurement law and regulations are involved and 40 U.S.C. 255 was pleaded in both cases. The principle that the Government's right to contract with contractors of its own choosing and its immunity from state regulation of their identity and activity inure to the benefit of its contractors, is controlling here.

Here the Commission held that the Power Company's contract to supply electric energy to the United States was illegal under State laws to the extent that the energy is used in territory allocated to the Cooperative, and that the Company could not furnish such service. The Commission went much further than the Contractor's Licensing Board did in the regulation and licensing of contractors. Act 103 of 1957 and the Commission's order did not merely reduce the number of potential bidders, as in *Leslie Miller* v. *Arkansas*, *supra*, but rather, permanently limited the Government's potential suppliers of electricity to one co-operative.

Section 3 of Act 103 contains an absolute prohibition against service by the Power Company in any territory ever allocated to the Co-operative. (See Appendix, p. 22.) This prohibition collides head-on with the Federal right and policy to enter into contracts with those persons whom it determines to be best qualified to carry out the national

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* On remand the Arkansas Court entered a Per Curiam order conforming to the mandate of the Supreme Court and setting aside the judgment of the trial court. 227 Ark. 313, 298 S.W. 2d 44.

purpose. It is difficult to imagine a clearer case of conflict and interference with Federal functions. It is a much more basic conflict than that in *Public Utilities Commission* v. *United States*, 355 U.S. 534, which involved only rates and cost of service, but where the Court held that California could not subject the United States or its contractors to the discretionary authority of the State for the terms on which it can contract for services.

The test of validity of State regulation is whether that regulation interferes in any substantial way with the performance of Federal functions; and Federal contractors are exempt from State regulation if the regulation substantially hinders the contractors in serving the Government as they were intended to serve it. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 154, 161; *Union Pacific Railroad* v. *Peniston*, 18 Wall 5, 33, 36.

There is no doubt that had the State Court not entered the decision it did, that the Power Company would be completely deprived of the power to serve the United States as the Government intended to be served. It therefore correctly held that the electric contract is immune from the application of State regulation.

A comprehensive scheme of procurement policies is found in the Armed Forces Procurement Act of 1947 (41 U.S.C. 151 *et seq.*) and the regulations thereunder, which have the force of law. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *Public Utilities Comm.* v. *United States*, 355 U.S. 534. The Act sets forth sixteen situations in which contracts may be negotiated, including instances where it is in the interest of the national defense (41 U.S.C. 151 (c) (1). The guiding principle of the law is that resulting contracts be "most advantageous to the Government, price and other factors considered". (41 U.S.C. 152) The regulations under which Federal officials negotiated

the power contract, expand further upon the factors to be considered. Besides price, procurement officers must take into account, *inter alia*, the judgment, skill and integrity of the supplier, its reputation and experience, and other advantages or disadvantages to the Government. (32 CFR 1.307; 32 CFR 3.101) Determinations of Federal officials under the Act are final (41 U.S.C. 156).

Unlike the case of *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, cited by Petitioner, where the Court found that the Army regulations expressly left applicability of state price legislation to be determined by the courts, and where the result of State Regulation would be merely an adjustment in cost to the Government (318 U.S. 276-278), Act 103 of 1957 and the Commission's order nullified the determination of Federal officials that the Power Company should supply all the electric energy at the Air Base under a single contract.

Petitioner argues that Paragraph 5 of the contract constitutes consent of the United States to subject itself to State control over the identity of electric suppliers. An attempt is made to give some substance to this position by the transparent device of quoting one sentence from Paragraph 5 completely out of context. Examination of the entire paragraph (Appendix p. 19) clearly reveals that the paragraph refers solely to rate regulation. Paragraph 5(a) deals with the filing of new rate schedules and formal rate regulation by the utility commission and 5(b) deals with amendments to and other changes in existing rate schedules. The majority opinion below correctly held that this was the intent of the paragraph. (See Opinion, Petition Appendix p. 41 at 49-50.) To hold otherwise would make the contract self-defeating, as compliance with State area allocation laws would have prevented the United States from selecting its own contractor-supplier and forced it to receive service from the

Co-operative. More importantly, it would have prevented the primary objective of the United States, i.e., construction of a single, integrated electric system on the Base. The record is filled with proof of the necessity of continuous service and the lengths to which the Government went to guarantee this type of service, which would not be available to it under a dual electric system. (See Opinion, Petition Appendix p. 43-46.)

Petitioner's argument that 50 U.S.C. 491 indicated a Congressional policy to submit to State regulatory jurisdiction is fallacious. First, this statute applies solely to the construction of special air warning and control installations. Secondly, Section 491 directs Government officials to utilize the facilities of utilities within their respective service areas "to the fullest extent practicable". The absence of such language in the Armed Forces Procurement laws is significant. Furthermore, since Section 491 only requires the secretary to take service area into account when he deems it "practicable", similar language in the Procurement law would not aid the Co-operative because the discretionary powers of Government officials were exercised and control over state authority.

(3) No rights of the Co-operative have been invaded by the Power Company.

The State Court's decision can readily be supported on substanital non-Federated grounds. A basic fallacy of the Co-operative's case is the claim that the contract between the Power Company and the United States constitutes an unlawful invasion of Co-operative territory, which it has a legal right to prevent. This argument is unsupported by any evidence or law. Section 3 of Act 103 for 1957, quoted and relied upon by the Commission, only prohibits public utilities from "furnishing electric services at retail and not for resale" in territory allocated

to co-operatives. Here, the Power Company does not furnish any electric service of any kind, retail or wholesale, to consumers in the housing project. Its sole connection with the Air Base is the sale of power to the United States, at wholesale, at a point where the Power Company is legally able to render service to those who demand it.

It is the Government that is distributing electric energy in the disputed area, not the Power Company. The Power Company has no contract with or obligations to any consumer in the housing project, does not meter individual usage, and does not bill or collect for power. No Company facilities are located within the Air Base, or connected directly with the distribution lines on the Base. This does not amount to an invasion of cooperative territory by the Company.

4. *The Commission's Order, as entered, was void even if there were no conflict with Federal Law.*

Petitioner argues that the Commission's Order did not affect the government and merely required the Power Company to meter the energy and account to the Cooperative for the energy used in Cooperative territory. If the Commission's Order did mean that the Power Company must pay or credit a portion of its gross earnings under the contract to the Cooperative, even though the Cooperative had no investment and performed no services, then the order is void. Such an order would result in the confiscation of the Company's property without due process of law, forbidden by Amendment XIV to the U.S. Constitution.

Since the Commission's Orders are legislative in nature (*Dept. of Public Utilities* v. *McConnell*, 198 Ark. 502, 130 S.W. 2d 9; *Live Oak Ass'n* v. *Railroad Commis-*

sion, 269 U.S. 354, 356) it would also result in an unlawful impairment of the Company's contract with the United States and its contract with the Cooperative, by retroactively reducing the benefits to the Company and adding additional burdens the Company did not contract to assume, *Columbia Ry. Gas Co.* v. *South Carolina*, 261 U.S. 236, Article I, Section 10, U.S. Constitution. Although the State Supreme Court did not find it necessary to expressly decide these constitutional questions, it did recognize the basic injustice of this interpretation of the order. (See Majority Opinion, Petition Appendix p. 41 at 42-43.) Furthermore, if the Cooperative's interpretation of the Commission Order were correct, the Commission in effect entered an award of damages, a judicial act it has no legal power to perform. (*See Dept. of Public Utilities* v. *McConnell*, 198 Ark. 502, 130 S.W. 2d 9).

Respondent also raised several other issues in its appeal to the State Court, which would have required a reversal of the Commission's Order, but which the Court did not reach in its decision because of its Court's finding of Federal immunity.

First, Act 103 was not lawfully adopted by the Legislature in accordance with the requirements of the Arkansas Constitution. (Article V Section 22 and Section 37, Appendix p. 23-24). These provisions require that each bill receive the vote of a "majority of each house" and that the votes be taken "by yeas and nays". Act 103 received only 18 votes in the Senate, 18 being a bare majority of the house. The eighteenth vote was cast by the Presiding Officer from a written "pair" filed by absent members. A "pair" is an agreement not to vote and cannot be counted as an affirmative vote, Webster's International Dictionary, 2d Ed. Unabridged, 1947;

Bovier's Law Dictionary (1928 Ed.); In Re opinion of the Justices, 228 Ala. 140, 143, 152 So. 901, 904. Since the Act was not validly enacted it cannot be enforced.

Second, the disputed area is in the City limits of Jacksonville in which the Company has an exclusive franchise. Application of Act 103 by the Commission would unlawfully impair the Company's contract rights under this franchise. (U. S. Const. Article I, Section 10) *Hot Springs Electric Co.* v. *Hot Springs*, 70 Ark. 300; *Columbia Ry. Gas Co.* v. *South Carolina*, 261 U.S. 236. Furthermore, the Cooperative has not obtained any municipal authority to use the City streets or sell electricity in the City.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIS H. HOLMES *and*

E. B. DILLON, JR.

1014 Boyle Building
Little Rock, Arkansas

Attorneys for Respondent

APPENDIX

BEFORE THE ARKANSAS PUBLIC SERVICE COMMISSION

FIRST ELECTRIC COOPERATIVE CORPORATION.....*Complainant*

v. No. U-1285

THE ARKANSAS POWER & LIGHT COMPANY.....*Defendant*

Complaint

Comes the above named plaintiff, by its attorney, Tom Gentry, and pursuant to Rule II of this Commission, herewith files its complaint against the above named defendant, and for its complaint states and alleges:

I

That the complainant is an Electric Cooperative Corporation organized and existing under and by virtue of the laws of the State of Arkansas, and engaged in the transmission and selling of electric power and energy to its various customers in the territory in the State of Arkansas heretofore granted to it by this Commission. That the defendant is a Public Utility Corporation, organized and existing under and by virtue of the laws of the State of Arkansas and engaged in the business of generating, transmitting and selling electric power to the general public within the territory assigned to it in the State of Arkansas by this Commission.

Complainant further states that this Commission in 1937, in docket U. 226 granted to it a certificate of public convenience and necessity to serve the following described area, in Pulaski County, Arkansas, to wit: Sections 15, 10, 3 N½ of Section 2 and Sections 1 in Twp. 3 North, Range 11 west, and Sections 6 and 7 in Twp. 3 north,

Range 10 west, a part of which now makes up the Little Rock Air Force Base of the United States Government, located near Jacksonville, Arkansas.

Complainant further states that the users of electric power and energy in the above described territory, under the certificate of public convenience and necessity, heretofore granted to it by this Commission, must be exclusively served electric power and energy by complainant by virtue of Act 103 of the 1957 Acts of the General Assembly of the State of Arkansas, as well as under the original order of this Commission which granted said territory to this complainant.

Complainant further states that the said defendant, Arkansas Power & Light Company, is now serving and providing and offering to serve or provide electric power and energy to the user or users thereof at retail and not for re-sale in said territory in violation of the orders of this Commission and in violation of the laws of the State of Arkansas.

Complainant further states that it is ready, willing and able to serve and provide electric energy or power to the user or users and any future user or users of electric power or energy in said territory or area.

Wherefore, premises considered, the complainant prays that this commission, in order to enforce its previous order assigning territory to this complainant and to enforce compliance with the Statutes of the State of Arkansas, issue its order directing the defendant, Arkansas Power & Light Company, to cease and desist from

furnishing, supplying or serving or offering to furnish, supply or serve electric power to any user or users at retail and not for re-sale for use or consumption in the above described territory.

FIRST ELECTRIC COOPERATIVE CORPORATION

By: /s/ Tom Gentry

Its Attorney

117 National Old Line Building
Little Rock, Arkansas

PARAGRAPH 5 OF CONTRACT, DATED FEBRUARY 19, 1954, BETWEEN THE ARKANSAS POWER & LIGHT COMPANY AND THE UNITED STATES

"5. *Public Regulation and Change of Rates.* (a) Public regulation. Service furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory commission having jurisdiction. If during the term of this contract the public regulatory commission having jurisdiction receives for file in authorized manner rates that are higher or rates that are lower than these stipulated herein for like conditions of service, the Contractor agrees to continue to furnish service as stipulated in this contract and the Government agrees to pay for such service at the higher or lower rates from and after the date when such rates are made effective.

(b) Change of rates. (1) Subject to paragraph (a) of this clause, in the event the Contractor, during the term of this contract, shall make effective any new rate schedule or amend rate schedule applicable to the class of service furnished the Government at the service location which may contain a lower rate or conditions more favor-

able to the Government for such class of service, the Contractor shall forward to the Contracting Officer a copy of such rate schedule or amended rate schedule within fifteen (15) days after the effective date thereof, and, upon receipt of written request from the Government, shall substitute such rate schedule or amended rate schedule for the rate schedule then in effect hereunder for such service location, commencing with the billing period in which such written request is received.

(ii) Subject to paragraph (a) of this clause, in the event of a permanent change in the class of service furnished the Government at the service location, service shall, effective sixty (60) days after written request is made by either party or at such other time as may be agreed upon, thereafter be furnished to such service location at the lowest available rate schedule of the Contractor which is applicable to the class of service furnished following such permanent change."

UNITED STATES STATUTORY PROVISIONS

Title 41 U.S.C. Section 151——

> §*151. Purchases and contractors for supplies and services—(a) Applicability to all Armed Services.*
>
> "The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds."
>
> • • • •

"(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

"(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;"

Title 41 U.S.C. Section 153——

"*§153. Types of contracts—(a) Discretion of agency head; warranty clause.*

"Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151(c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. • • •"

Title 41 U.S.C. 156——

"*§156. Determination and decisions—(a) Powers of agency head; finality; delegation.*

"*The determinations and decisions provided in this chapter* to be made by the agency head may be tracts or with respect to classes of purchases or made with respect to individual purchases and concontracts, and *shall be final.* Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency."

ARKANSAS STATUTORY PROVISIONS

Section 3 of Act 103 of 1957 (Ark. Stat. §73-240)

"*Section* 3. Section forty-one (41) of Act 324 of the Acts of the General Assembly of Arkansas of 1935, as amended (Arkansas Statutes, Section 73-240) is hereby amended to read as follows:

" 'No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the Department (Commission) a certificate that public convenience and necessity require, or will require, such construction or operation; provided that if such construction or operation has been commenced under a limited or conditional certificate, or authority as hereinafter provided in Section 43 (Section 73-242), this Section shall not be construed to require such certificate nor shall such certificate be required for an extension within any municipality or district within which service has heretofore been lawfully supplied, or for an extension within, or to territory then being served, or necessary in the ordinary course.

" 'Notwithstanding the provisions of " is Act or any other provisions of law, or the terms of any certificate of convenience and necessity, franchise, permit, license or other authority granted to a public utility by the State or a municipality no public utility shall furnish or offer to furnish electric service at retail and not for re-sale in any area heretofore allocated by the Commission to an electric cooperative corporation pursuant to Section 31 of Act 342 of the Acts of the General Assembly of 1937 (Arkansas Statutes, Section 77-1131).' "

United States Constitution

Article I, Section 10:

"§10. [Powers denied the states.]—(1.) No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

United States Constitution

Article VI, Section 2:

"(2.) This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Arkansas Constitution

Article V, Section 22:

"*Passage of bills.*—Every bill shall be read at length on three different days in each house, unless the rules be suspended by two-thirds of the house, when the same may be read a second or third time on the same day; and no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of each house be recorded thereon as voting in its favor."

Arkansas Constitution

Article V, Section 37:

"*Laws—Enactment—Majority required.*—Sec. 1. Not less than a majority of the members of each House of the General Assembly may enact a law."